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No. 815

IN THE SUPREME COURT OF THE UNITED STATES

GUY T. KELLEY, IRENE R. KELLEY,
LOUIS TERRANA, ROBERT H. BOYD,
FRANK B. MONROE, NAN SMITH,
THELMA STRAIGHT, AGNES THOMAS,
HOMER CHARLES and MELVIN TUFFO,
Appellants,

v.

WILLIAM RAGGIO, C. W. (BUD) YOUNG,
TED BERRUM and ROBERT GALLI,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

JURISDICTIONAL STATEMENT

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INDEX
and
TABLE OF CITATIONS

Subject	*Page*
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	2
Statement of Case and How the Federal Question is Presented	3
The Question is Substantial	5
Appendix A	15
Appendix B	23

Cases Cited

Abdo v. City of Daytona Beach (Fla.) 118 So.(2d) 540	10
Adams v. Miami Beach Hotel Association (Fla) 77 So.(2d) 465	12
Alper v. Las Vegas Motel Association (Nev.) 325 P.(2d) 767	12
Borden's Farm Products Co. v. Baldwin 293 U.S. 194, 79 L.Ed. 281	6
Burns Baking Co. v. Bryan 264 U.S. 504, 68 L.Ed. 813	2, 6
City of Daytona Beach v. Abdo (Fla.) 112 So.(2d) 398	9
City of Lake Charles v. Hasha (La.) 116 So.(2d) 277	12
Dade County v. Gould (Fla) 99 So.(2d) 236	9, 10
Gambone v. Commonwealth (Pa.) 101 A.(2d) 634	11
Lawton v. Steele 152 U.S. 133, 38 L.Ed. 385	2, 5

INDEX
and
TABLE OF CITATIONS

[CONTINUED]

Subject	*Page*
Miami Laundry Co. v. Florida Dry Cleaning & L. Bd. 183 So. 759, 119 A.L.R. 956	10-11
New State Ice Co. v. Liebmann 285 U.S. 262, 76 L.Ed. 747	2, 6
Paramount Pictures v. Langer 23 F. Supp. 890	2, 6
Rast v. Van Deman & Lewis Co. 240 U.S. 342, 60 L.Ed. 679	7-8
Regal Oil Co. v. State (N.J.) 10 A.(2d) 495	11
Serve Yourself Gasoline Stations Association v. Brock 345 U.S. 980, 97 L.Ed. 1394	7
Serve Yourself Gasoline Stations Association v. Brock (Cal.) 249 P.(2d) 545	7
State v. Blackburn (Fla.) 104 So.(2d) 19	11-12
State v. Garrubo (N.J.) 10 A.(2d) 635	11
State v. Guyette (R.I.) 102 A.(2d) 446	11
The Town of Miami Springs v. Scoville (Fla.) 81 So.(2d) 188	9
Treigle v. Acme Homestead Association 297 U.S. 189, 80 L.Ed. 575	2, 6

Statutes Cited

28 U. S. C., § 1257(2)	2
Chapter 415, Statutes of Nevada 1959, page 639	2

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960

No.....

GUY T. KELLEY, IRENE R. KELLEY, LOUIS TERRANA, ROBERT H. BOYD, FRANK B. MONROE, NAN SMITH, THELMA STRAIGHT, AGNES THOMAS, HOMER CHARLES and MELVIN TUFFO,
Appellants,

v.

WILLIAM RAGGIO, C. W. (BUD) YOUNG, TED BERRUM and ROBERT GALLI,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Nevada, entered on March 31, 1960, affirming the judgment of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, dismissing the complaint of appellants and vacating the temporary restraining order, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Nevada in *Kelley et al v. Raggio et al*, is reported in 350 P. (2d) 724.

The opinion of the Supreme Court of the State of Nevada in *Vaile et al v. Foley et al*, held to be determinative of the issues in the instant case, is reported in 350 P. (2d) 721. These two opinions are set forth in Appendix A.

JURISDICTION

This action was brought to enjoin the enforcement of a statute of the State of Nevada regulating and prohibiting motel, hotel price sign advertising. The judgment of the Supreme Court of the State of Nevada was entered on March 31, 1960, and notice of appeal was filed in that Court on June 14, 1960. Jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal: *Lawton v. Steele*, 152 U.S. 133, 38 L.Ed. 385; *Burns Baking Co. v. Bryan*, 264 U.S. 504, 68 L.Ed. 813; *New State Ice Co. v. Liebmann*, 285 U.S. 262, 76 L.Ed. 747; *Treigle v. Acme Homestead Association*, 297 U.S. 189, 80 L.Ed. 575; *Paramount Pictures v. Langer*, 23 F. Supp. 890. (Reversed 306 U.S. 619 on other grounds.)

STATUTE INVOLVED

Chapter 415, Statutes of Nevada 1959, page 639 (Nevada Revised Statutes, § 651.040), as set forth in Appendix B hereto.

QUESTION PRESENTED

The Nevada statute makes it unlawful for any hotel or motel to post or maintain any outdoor sign, or any sign visible from the outside, advertising rates or even advertising accommodations with phraseology which refers to

"special rates" or "reasonable rates". The question presented is:

Whether the regulations and prohibitions contained in the statute violate the XIVth Amendment to the Constitution of the United States in that they are unreasonable and arbitrary and in that they bear no reasonable relation to the end sought, that is, to prevent misleading or deceptive advertising and to prevent overcharging; whether the statute results in an unreasonable and arbitrary restraint, interference and burden on the hotel and motel owner in violation of his property rights and in violation of his right to advertise his business, his accommodations and his rates in an open and truthful manner.

STATEMENT OF CASE

The appellants are motel owners in the Reno area in Washoe County, Nevada. On April 6, 1959, a statute was approved in the State of Nevada which applied to Clark and Washoe Counties, and which in effect completely prohibited the advertising of hotel and motel prices by the use of outdoor signs. The prohibition is so complete with respect to signs that it is unlawful to post a sign advertising that accommodations are "reasonable" and the statute applies to any sign whether within or without the establishment which is visible to the public from the outside.

On April 15, 1959, nine motel owners, the appellants herein, filed a complaint to enjoin the enforcement of the statute and among other things alleged that the statute was unconstitutional because it is an unreasonable and arbitrary exercise of the police power and that it bears no reasonable

relation to the end sought and that the statute imposes unreasonable and unnecessary restrictions upon motel owners and deprives them of a valuable property right without due process of law. The complaint also alleged that an enforcement of the statute would cause the appellants to suffer immediate and irreparable loss and that the statute was detrimental and damaging to them. (Record on Appeal, Vol. 1, pages 1, 6, 7, 8).

On April 17, 1959, on the basis of the complaint the Honorable A. J. Maestretti, presiding District Judge, issued a temporary restraining order against the appellees. (Record on Appeal, Vol. 1, page 11). The evidence showed at the time of the hearing that the appellants were comparatively small motel owners operating some distance from the center of the City of Reno and that it was absolutely necessary that they be permitted to advertise their rates with signs and if they were not able to do so they would suffer considerable financial loss and damage. There was evidence of complaints with regard to excessive charging in the area. The facts were developed to the effect that the appellants displayed accurate and truthful signs with reference to rates and that the elimination of price signs would have no effect on fraud, deception and overcharging.

The case was argued on June 24th, 1959, and on June 26th, 1959, judgment was entered in favor of the appellees and the temporary restraining order was dismissed and vacated. (Record on Appeal, Vol. 1, pages 22, 23)

On July 23rd, 1959, notice of appeal was filed on behalf of appellants and the errors assigned and the issues raised were confined principally to the issue raised on this appeal,

namely, that the statute was and is an unreasonable and arbitrary exercise of the police power and therefore unconstitutional. The Supreme Court of the State of Nevada disposed of the issue by finding that although there was no evidence in the record to show the need for the legislation, that the existence of facts to support the legislative enactment was presumed and that the appellants had failed to overcome the presumption of the validity of the statute.

THE QUESTION IS SUBSTANTIAL

As has been stated, there is only one issue in this case: whether the regulations and prohibitions contained in the Nevada statute are unreasonable and arbitrary in that they bear no reasonable relation to the end sought.

Without regard to the fundamental constitutional principles involved, the Supreme Court of the State of Nevada has sustained the statute on the basis of a presumption which in effect was considered irrebuttable. The effect and meaning of the state court decision is that there is no limit to the police power of the state.

The principles of constitutional law applicable here have been enunciated many times. The state may, in the exercise of its police power, enact legislation for the purpose of protecting and regulating public health, public safety, public morals and the general welfare. This power is not without limitation.

This Court *in Lawton v. Steele*, 152 U.S. 133, 136-137, 38 L.Ed. 385, 388, stated as follows:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the

> interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive, upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In *Treigle v. Acme Homestead Association*, 297 U.S. 189, 197, 80 L.Ed. 575, 580-581, this Court stated as follows:

> "Though the obligations of contracts must yield to a proper exercise of the police power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

See also *Burns Baking Co. v. Bryan*, 264 U.S. 504, 68 L.Ed. 813 and *New State Ice Co. vs Liebmann*, 285 U.S. 262, 76 L.Ed. 747.

The presumption which attaches to a legislative determination is not final and conclusive. It is a presumption of fact and is rebuttable and the Court will carefully review the purported exercise of the police power. *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209-210, 79 L.Ed. 281, 288-289; *Paramount Pictures v. Langer*, 23 F. Supp. 890. (Reversed 306 U.S. 619 on other grounds).

The precise question involved in this appeal has not been passed on by this Court. *Serve Yourself Gasoline Stations Association v. Brock*, 345 U.S. 980, 97 L.Ed. 1394, was dismissed by this Court for want of a substantial Federal question because the California statute there involved did not prohibit advertising but simply and properly required that the advertising be truthful and accurate. The Supreme Court of California in the same case [249 P.(2d) 545] had previously held inapplicable the series of cases declaring statutes unconstitutional which prohibit all price advertising on or near gasoline stations except those signs of a limited size permitted on the pumps. It held that the California statute was substantially different because it did not prohibit effective advertising, but rather encouraged it. The Court at page 548 stated as follows:

> "The difference is of significance. The ultimate right to advertise price is unaffected by our statutes. Although the Legislature may be denied the power to destroy a given right, the authority to regulate its exercise is recognized."

In the case before this Court the statute does not seek to regulate and require truthful and accurate advertising. It simply eliminates all outdoor price advertising by prohibition. The right to advertise a legitimate business truthfully and openly is a fundamental constitutional right.

This Court has early recognized the distinction between ordinary direct advertising and other types of advertising involving schemes and ulterior purposes. In *Rast v. Van*

Deman & Lewis Co., 240 U.S. 342, 365, 60 L.Ed. 679, 690, this Court defined advertising as follows:

> "Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior; it is the practice of old and familiar transactions and has sufficed for their success."

In the case now before this Court the advertising of room rates has no other object than to draw attention to the accommodations and "the matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior . . ." Thus, under some conditions, none of which are present here, advertising schemes can be regulated and even prohibited. Simple direct advertising can be regulated so that it shall be accurate and truthful, but it cannot be prohibited.

Having in mind the foregoing constitutional principles and the fundamental rights involved, a review of the opinion of the Supreme Court of Nevada reveals that the Court never reached the issue, but instead covered or obscured it with a presumption.

The important errors in fact and reasoning resulting in errors at law are as follows:

(1) The appeal involves the validity of subsection 1 as well as subsection 2 of the statute, because the former con-

tains the sweeping unconstitutional definitions of outdoor signs and rates. The Court simply ignored these aspects and contentions.

(2) The Court states that the statute here involved is restrictive and regulatory and is not an absolute prohibition. Under the circumstances, this is not true because it was proven and it is obvious that the outdoor price sign is the effective way to advertise accommodations and this statute literally and actually eliminates the only effective way for a legitimate operator to advertise and it, therefore, does involve an absolute denial of a property right.

(3) The heavy reliance on *City of Daytona Beach v. Abdo*, (Fla.) 112 So.(2d) 398, is absolutely unwarranted and unjustified. It is submitted that the Court overlooked the true holding in the Florida case.

In the first place, the Florida District Court of Appeal reversed the granting of a summary judgment on the ground that there were factual issues to be heard and determined, particularly with reference to the æsthetic ground which in Florida is the recognized exception to the fundamental principle that price sign advertising cannot constitutionally be prohibited.

Secondly, Florida is with the great majority of states in holding that the prohibition or regulation of price signs is a violation of the due process clause of the state and federal constitutions. *The Town of Miami Springs v. Scoville*, 81 So.(2d) 188. In Florida, the exception stated in that case and in *Dade County v. Gould*, 99 So.(2d) 236, is that in very particular areas of limited zoning for æsthetic reasons only,

all outdoor rate signs or other types of advertising can be prohibited. It should be noted that even in the case of *Dade County v. Gould, supra*, where the Court sustained a regulation on æsthetic grounds, the Court did strike down a provision against signs, "visible from the outside" because obviously æsthetics were not involved and such a prohibition violated the fundamental constitutional right to advertise.

The Supreme Court of Florida in *Abdo vs City of Daytona Beach*, 118 So.(2d) 540, made all of this very clear. (The opinion in that case came out after the argument before the Nevada Supreme Court and while the latter Court was considering its decision.) In an opinion denying certiorari, the Supreme Court was concerned over a statement by the District Court of Appeal to the effect that the Supreme Court had receded from its previous holding that a prohibition was unconstitutional. The Supreme Court of Florida pointedly stated and clearly reiterated that the issue always is a factual one and depends on the area involved. Thus, the law of Florida remains consistent and unchanged and strongly supports our position that in this situation this statute is unconstitutional.

(4) The Court attempts to distinguish the applicable cases holding unconstitutional the statutes limiting outside price advertising of gasoline to signs of a certain size and prohibiting larger signs which would be effectively seen by the travelling public. It is recognized by the Supreme Court of Nevada that the purpose is the same, namely, to protect the travelling public from fraud and deception.

It is implicit that there is no magic in the designation "affected with the public interest". *Miami Laundry Co. v.*

Florida Dry Cleaning & L. Bd., 183 So. 759, 119 A.L.R. 956, 961-962.

See also *State v. Guyette*, (R.I.) 102 A.(2d) 446, 447-448, where it is pointed out that whether or not a business is affected with a public interest is not the answer to the controlling question in this type of case. The impact is the same on the travelling public whether it is a motel or a gas station and the Supreme Court of Nevada seems to assume this.

But the Nevada Supreme Court simply says that since the public could be better protected by larger signs where there was a limitation in size, it is not analogous to our situation and there is no merit in our contention that the public would be better protected by the existence of signs where there is a prohibition. If it is unconstitutional to limit the size of signs it is certainly unconstitutional to prohibit them altogether.

The reasoning contained in *Gambone v. Commonwealth*, (Pa.) 101 A.(2d) 634, 637, is sound in this respect. That Court stated that it could be claimed that some dealers used misleading and deceptive advertising, but certainly the size of the sign would have no relevancy to the perpetration of the fraud. The Court concluded that to prevent fraud there should be a regulation against placing false statements on a sign and not a prohibition.

See also *Regal Oil Co. v. State*, (N.J.) 10 A.(2d) 495; *State v. Garrubo*, (N.J.) 10 A.(2d) 635; *State v. Blackburn*,

(Fla.) 104 So.(2d) 19; *City of Lake Charles v. Hasha*, (La.) 116 So.(2d) 277.

It is submitted that these cases are precisely in point and their enunciation of the constitutional principles involved is sound.

(5) The Supreme Court of Nevada states, "True it is that there is no evidence in the record herein which would tend to show the need for this particular legislation to protect the travelling public." Then the Court cites *Adams v. Miami Beach Hotel Association*, (Fla.) 77 So.(2d) 465, which like the Nevada case, *Alper v. Las Vegas Motel Association*, 325 P.(2d) 767, involved an ordinance which made it unlawful to advertise falsely. This is our point. Such a regulation is reasonable and constitutional, but these cases do not support the total prohibition.

The Court then goes on to state that "the existence of facts supporting the legislative judgment is presumed". Thus, the Court made no inquiry into the facts and exercised no review powers. There was a two-day trial of this matter and the Court heard considerable evidence. The Supreme Court says there was no evidence tending to show the need for the legislation but did not consider the evidence which showed that the legislation was unreasonable and arbitrary, that it bore no reasonable relation to the end sought and that it deprived the appellants of valuable property rights. Furthermore, the statute is obviously invalid on its face

and certainly the Court cannot brush all contentions away by simply saying there is a presumption which cannot be overcome.

In summary, the Supreme Court ignored the facts and the law, refused to really consider the issue here raised and rejected our contention without reason. We submit that with the denial of the fundamental right to advertise, a substantial question has been raised under the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

GUY T. KELLEY, IRENE R. KELLEY, LOUIS TERRANA, ROBERT H. BOYD, FRANK B. MONROE, NAN SMITH, THELMA STRAIGHT, AGNES THOMAS, HOMER CHARLES AND MELVIN TUFFO, APPELLANTS, *v.* WILLIAM RAGGIO, C. W. (BUD) YOUNG, TED BERRUM AND ROBERT GALLI, RESPONDENTS.

No. 4236

[Filed March 31, 1960]

Appeal from the Second Judicial District Court, Washoe County; A. J. Maestretti, Judge, Department No. 2.

Affirmed.

Gray & Young, of Reno, for Appellants.

William J. Raggio, District Attorney, Washoe County, of Reno, for Respondents.

Roger D. Foley, Attorney General, and *John A. Porter*, Deputy Attorney General, Amici Curiae.

OPINION

By the Court, MCNAMEE, C. J.:

This is an appeal from a judgment dismissing a complaint to enjoin the enforcement of NRS 651.040 upon the ground of its unconstitutionality.

It is conceded that the identical principles of law presented herein were urged in the case of Viale v. Foley, No. 4235, Nev., ... P.2d ....., the opinion in which has been handed down today. The decision in that case is determinative of the issues here involved.

Affirmed.

BADT and PIKE, JJ., concur.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES VIALE, DOING BUSINESS AS LAS GABLES MOTEL; WESTERN MOTELS, INC., A NEVADA CORPORATION, DOING BUSINESS AS MIRAGE MOTEL; WILLIAM HOPKINSON, DOING BUSINESS AS TURF MOTEL; MOTEL MANAGEMENT, INC., A TEXAS CORPORATION, DOING BUSINESS AS DESERT ISLE MOTEL; DONALD H. GILBERT, DOING BUSINESS AS ORINDA MOTEL; ABRAHAM SCHNIDER AND MARJORIE SCHNIDER, DOING BUSINESS AS MATER-MEA-INN; LOUIS G. MANGELSON, DOING BUSINESS AS CARDINAL MOTEL; J. JULIUS RAPP, DOING BUSINESS AS FIESTA MOTEL; STEPHEN C. DANIELS, DOING BUSINESS AS MIDWAY MOTEL; GEORGE L. WRIGHT, DOING BUSINESS AS WRIGHT'S MOTEL & APARTMENTS; DONALD H. GILBERT, AND ROBERT ROSOFF, APPELLANTS, *v.* GEORGE FOLEY, DISTRICT ATTORNEY OF CLARK COUNTY, STATE OF NEVADA; W. E. LEYPOLDT, SHERIFF OF CLARK COUNTY, STATE OF NEVADA; RAY K. SHEFFER, CHIEF OF POLICE OF THE CITY OF LAS VEGAS, STATE OF NEVADA, RESPONDENTS.

No. 4235

[Filed March 31, 1960]

Appeal from the Eighth Judicial District Court, Clark County; George E. Marshall, Judge, Department No. 4.

Affirmed.

Murray Posin, of Las Vegas, for Appellants.

George Foley, District Attorney, Clark County, of Las Vegas, for Respondents George Foley and W. E. Leypoldt.

Calvin Cory, of Las Vegas, for Respondent Ray K. Sheffer.

George Dickerson, of Las Vegas, Amicus Curiae.

OPINION

By the Court, McNAMEE, C. J.:

This appeal involves the validity of subsection 2 of NRS 651.040 which prohibits outdoor or outside advertising of rates by hotels and motels for accommodations.[1]

Appeal is taken from the denial of relief in three separate cases, one a suit to enjoin the enforcement of the statute, and the other two being petitions for writ of habeas corpus brought by two persons convicted of violating the prohibitory provisions of the statute.

It is conceded by all appellants that motels and hotels are affected with a public interest and are subject to reasonable regulation by the legislature under its police power in order to promote the health, safety, morals, and general welfare of the public. It is also conceded that the advertisement of motel and hotel rates are (sic) subject to legislative regulation. *Alper v. Las Vegas Motel Association*, 74 Nev. 135, 325 P.2d 767.

The only question for determination is whether NRS 651.040 is a reasonable regulation insofar as it prohibits outside advertising of such rates.

Statutes come to a court clothed with the presumption of validity, *Caton v. Frank*, 56 Nev. 56, 44 P.2d 521, and if enacted in the exercise of police powers it is presumed that the legislature intended to promote the public welfare. *Semler v. Oregon State Board of Dental Examiners*, 148 Ore. 50, 34 P.2d 311, aff'd, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. The burden is upon those attacking the statute to make a showing that the statute is unconstitutional. *Weaver*

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[1] "2. It is unlawful for any owner or keeper of any hotel, inn, motel or motor court in this state to post or maintain posted on any outdoor or any outside sign:

"(a) Advertising with reference to any rates at which rooms or accommodations may be secured at such establishment.

"(b) Advertising which employs terminology with reference to special rates for rooms or accommodations at such establishment.

"(c) Advertising the corporate or fictitious name of such establishment or membership in any organization the name of which pertains to or can be reasonably construed as pertaining to the rate of rooms or accommodations at such establishment."

v. Palmer Bros. Co., 270 U.S. 402, 46 S.Ct. 320, 70 L.Ed. 654; *Serve Yourself Gasoline Stations Ass'n. v. Brock*, 39 Cal.2d 813, 249 P.2d 545.

The general rule is that the legislature in the exercise of its police power may regulate commercial business advertising, but it cannot absolutely prohibit such advertising when it is not malum in se, because such prohibition would deprive a person of a property right without due process of law.[2] *Serve Yourself Gasoline Stations Ass'n. v. Brock*, supra; *People v. Osborne*, 17 Cal.App. Supp.2d 771, 59 P.2d 1083. See *City of Reno v. District Court*, 59 Nev. 416, 95 P.2d 994; *Hart v. City of Beverly Hills*, 11 Cal.2d 343, 79 P.2d 1080.

It is to be noted that the restrictive legislation found in said subsection 2 pertains to advertising only; that the advertising which is regulated relates only to room rates; and that the advertising of room rates is prohibited only with respect to outdoor or outside signs. Under these circumstances it cannot be said that there is a prohibition against all forms of advertising nor is there a total prohibition of advertising of room rates. The statute does not prohibit all outdoor signs or all advertising. Outdoor advertising of the type of accommodations, services, and accessories afforded is not restricted. Advertising of rates by newspaper, television, radio broadcasting, handbills, etc., is not prohibited. In other words, the statute must be construed as restrictive and regulatory of the manner and means of advertising rates rather than an absolute prohibition against any kind of advertising and thus involves no absolute denial of a property right without due process of law.

In the case of *City of Dayton Beach v. Abdo, Fla.*, 112 So.2d 398, the District Court of Appeal of Florida had before it a city ordinance which totally prohibited outdoor advertising of hotel and motel rates, and in addition thereto the ordinance prohibited outdoor advertising of free accessories

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[2] It is conceded that in the regulation of professions, rate advertising may be prohibited. See **Semler v. Oregon State Board of Dental Examiners**, supra.

and free services. The court held that such an ordinance was not unconstitutional on its face.

The opinion recites:

"It seems to have been the primary thrust of plaintiff's position before the chancellor, and his position here, that since the ordinance in question is *prohibitory* as distinguished from *regulatory* in character, it violates his constitutional right to not be deprived of life, liberty or property without due process of law. He agrees as did the chancellor, that the ordinance might be valid if it merely sought to regulate the size, type and composition of outdoor advertising signs. He successfully contended in the trial court, and contends here, that the absolute prohibition of outdoor advertising of rates for tourist accommodations bears no reasonable relationship to the general welfare of the community, and is therefore not the proper subject of regulation under the police power granted to the City in its charter."

The Florida appellate court held in effect that even the total prohibition is not fatal to constitutionality if the general welfare will be protected, and went on to say that whether the general welfare would be protected was a factual matter which should not be determined on a motion for summary judgment. The decree of the lower court was reversed: Certiorari was denied by the Supreme Court of Florida on March 2, 1960. *Abdo v. City of Daytona Beach, Fla.*, ... So.2d .....

Even in cases where there is no total prohibition of advertising, the regulation will not be sustained if it is arbitrary or unreasonable, and is not reasonably related to the end sought to be achieved which in this case is the protection of the traveling public. It was because of this rule that legislation limiting outside price advertising of gasoline to small placards posted on gas pumps has been held invalid. *Gambone v. Commonwealth*, 375 Pa. 547, 101 A.2d 634. The purpose of the regulation in that case was to prevent fraud and deception, and it is apparent that the public could be better protected by signs in excess of a certain prescribed size. Accord, *State v. Guyette*, 81 R.I. 281, 102 A.2d 446. The

contention of appellants that an analogy may be drawn from such cases is without merit.

True it is that there is no evidence in the record herein which would tend to show the need for this particular legislation to protect the traveling public. That the protection of the traveling public is necessary to promote the general welfare is pointed out, however, in the case of *Adams v. Miami Beach Hotel Association, Fla.*, 77 So.2d 465. In that case without any determination of facts the Florida Supreme Court said: "It is a matter of common knowledge that travelers are often confronted with a sign proposing comfortable lodging at very modest prices, say, $2.50 to $4.00 per night. He pulls up to such a place and finds that all rooms at the advertised price are taken and that the only available lodging is two or three times the price advertised. It can readily be seen that the underlying purpose of the act is to break up this species of deception. Some of the hotels go so far, as to advertise their rates and then when one gets in and registers he is charged a 'convention' rate, four or five times the regular rate advertised." See also *City of Sarasota v. Sunad, Inc., Fla.*, 114 So.2d 377.

While it is proper for the trial court to permit the introduction of evidence as an aid in its determination of the validity of a statute resulting from the need to promote the general welfare, Ex parte Kair, 28 Nev. 127, 80 P. 463, 113 Am.St.Rep. 817, 6 Ann.Cas. 893, the existence of evidence in the record of facts which would justify the enactment is not necessary; the existence of facts supporting the legislative judgment is presumed. Ex parte Nash, 55 Nev. 92, 26 P.2d 353; *Clark v. Paul Gray*, 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001; *U.S. v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234. "The Legislature, in the first instance, is the judge of what is necessary for the public welfare, and, in the absence of a showing of arbitrary interfence with property rights or of the lack of a substantial relation between means and a legitimate subject for regulation, we cannot declare this legislation invalid. * * * [I]t must be presumed that the Legislature has made a careful investigation in the field, and that it has properly determined that the interests

of the public require this regulation." *Serve Yourself Gasoline Stations Ass'n v. Brock*, supra. In *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679, the court said "* * * legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. * * * It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. * * * It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare."

In addition to the presumption of the need of this statute for the promotion of the public welfare, such need for this type of regulation is further evidenced by the fact that the 1960 session of the Nevada Legislature has enlarged the application of NRS 651.040 to apply to counties having a population of 10,000 or more persons when theretofore it applied only to counties of 25,000 or more persons.

The contention of appellants that the statute is discriminatory and arbitrary in violation of state and federal constitutions in that it is made applicable only to counties having a certain minimum population and is not therefore a general law is without merit. To be a general law, a statute does not have to be operative every place in the state. *State ex rel Shixley v. Lutz*, 226 Ala. 497, 147 So. 429; *State v. Dade County*, 157 Fla. 859, 27 So.2d 283; *Robinson v. Broome Co.*, 276 App.Div. 69, 93 N.Y.S.2d 662, aff'd, 301 N.Y. 524, 93 N.E.2d 77.

The statute in question does not infringe upon the constitutional guarantee of free speech. *Hirsch v. City and County of San Francisco*, 143 Cal.App.2d 313, 300 P.2d 177.

Appellants have failed to overcome the presumption of the validity of the contested statute. The judgment of the lower court holding constitutional NRS 651.040 and denying relief to appellants is therefore affirmed.

BADT and PIKE, JJ., concur.

APPENDIX B

CHAPTER 415

AN ACT to amend chapter 651 of NRS, relating to public accommodations, by creating a new provision regulating advertising on outdoor or outside signs by owners or keepers of hotels, inns, motels or motor courts; by defining certain words and terms; by requiring owners or keepers of hotels, inns, motels or motor courts to post conspicuously statements of charges or rates of charges by the day for lodging; by requiring the maintenance and use of registration cards and the issuance of receipts; by imposing both civil and criminal penalties for violations; by providing for the operation of the statute only in counties of this state having a population of 25,000 or more persons; and by providing other matters properly relating thereto.

[Approved April 6, 1959]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 651 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. As used in this section, unless the context otherwise requires:

(a) "Corporate or fictitious name" means "$4.00 motel" or similar name or any phraseology used in the name the reasonable construction of which implies the rate at which rooms for accommodations may be secured at such establishment.

(b) "Establishment" means any hotel, motel, inn or motor court.

(c) "Membership in an organization" means "member of $4.00 motel association" or similar organization names or any phraseology used in the organization name the reasonable construction of which implies the rate at which rooms or accommodations may be secured at such establishment.

(d) "Outdoor sign" or "outside sign" means any sign maintained outside the establishment, whether on, connected to or separated from the establishment, or any sign, whether within or without the establishment, which is visible to the public from the outside.

(e) "Owner" or "keeper" means any person, firm, association or corporation.

(f) "Rates" means the total charge levied at such establishment for rooms or accommodations.

(g) "Special rates" means "special rates," "cut rates," "low rates," "lowest rates," "lowest rates in town," "reasonable," "inexpensive" or any similar phraseology the reasonable construction of which implies that a bargain in rates is offered at such establishment.

2. It is unlawful for any owner or keeper of any hotel, inn, motel or motor court in this state to post or maintain posted on any outdoor or any outside sign:

(a) Advertising with reference to any rates at which rooms or accommodations may be secured at such establishment.

(b) Advertising which employs terminology with reference to special rates for rooms or accommodations at such establishment.

(c) Advertising the corporate or fictitious name of such establishment or membership in any organization the name of which pertains to or can be reasonably construed as pertaining to the rate of rooms or accommodations at such establishment.

3. Nothing contained in subsection 2 shall be construed as requiring any establishment therein referred to to maintain outdoor signs or outside signs.

4. Every owner or keeper of any hotel, inn, motel or motor court in this state shall post, in a conspicuous place in the office and in every bedroom of such establishment, a printed copy of a statement of charge or rate of charges by the day for lodging. The rates posted in the office and every bedroom of such establishment shall display the daily rate of such room for occupancy by one person, for occupancy by two persons, the additional charge for each person over two persons, or the additional charge for each additional bed provided in such room. Every establishment shall maintain a registration card for each room and supply the person or persons registering for accommodations a receipt. Both the

registration card and the receipt shall reflect the type of accommodation supplied, the number of persons occupying such accommodation and the rate charged each person therefor. No establishment shall charge more than the posted rates, or require as a condition of securing accommodations that any person pay for a greater number of days than actually requested or that the accommdoations are actually occupied by the person or persons.

5. For any violation of this section, or any provision herein contained, the offender shall forfeit to the injured party 3 times the amount of the sum charged in excess of what he is entitled to charge.

6. Any owner or keeper of any establishment who violates any of the provisions of this section is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $50 nor more than $250, or by imprisonment in the county jail for not less than 10 days nor more than 30 days, or by both fine and imprisonment.

7. The provisions of this section shall apply only in a county having a population, according to the latest United States decennial census, of 25,000 or more persons.

SEC. 2. This act shall become effective upon passage and approval.

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No. 316

IN THE SUPREME COURT OF THE UNITED STATES

GUY T. KELLEY, IRENE R. KELLEY, LOUIS TERRANA, ROBERT H. BOYD, FRANK B. MONROE, NAN SMITH, THELMA STRAIGHT, AGNES THOMAS, HOMER CHARLES AND MELVIN TUFFO,

Appellants,

v.

WILLIAM RAGGIO, C. W. (BUD) YOUNG, TED BERRUM, AND ROBERT GALLI,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES

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IN THE SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. .....

GUY T. KELLEY, IRENE R. KELLEY, LOUIS TERRANA, ROBERT H. BOYD, FRANK B. MONROE, NAN SMITH, THELMA STRAIGHT, AGNES THOMAS, HOMER CHARLES AND MELVIN TUFFO,

Appellants,

v.

WILLIAM RAGGIO, C. W. (BUD) YOUNG, TED BERRUM, AND ROBERT GALLI,

Appellees.

MOTION TO AFFIRM, PURSUANT TO SUPREME COURT RULE 7

COME NOW the appellees herein and move the Court to affirm the judgment of the Supreme Court of the State of Nevada from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated September 12, 1960.

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INDEX AND TABLE OF CITATIONS

The Problem Described 7–9

The Statutory Remedy 9–10

Appellants' Argument 10–11

Appellees' Contentions

A. The Nevada Statute Constitutes a Valid Exercise of the State's Police Power and Is Not Violative of Any Federal Guarantee 11–15

B. (1) The Nevada Statute Is Restrictive and Regulatory: It Involves No Absolute Denial of Property Rights: And It Is Not Violative of Any Constitutional Guarantee.

(2) The Evidence Submitted Below By Appellants Was Not Sufficient to Rebut the Presumption of Constitutional Validity of the Nevada Statute 16–17

C. The Weight of Authority Relative to Restrictive Regulations of Gasoline Price Advertisements Are Not Applicable Nor Controlling of the Question Herein 17–18

Conclusion 19

CASES CITED

Adams v. Miami Beach Hotel Association, Fla.
77 So.2d 465 ..... 10, 14

Booth v. Illinois
184 U.S. 425, 429, 46 L.Ed. 623 13

Breard v. Alexandria
341 U.S. 622, 632, 95 L.Ed. 1233, 1242, 71 S.Ct. 920, 35 A.L.R.2d 335, at pages 344–345 ..... 12, 15

City of Sarasota v. Sunad, Inc., Fla.
114 So.2d 377 10

Clark v. Paul Gray
306 U.S. 583, 594, 59 S.Ct. 744, 83 L.Ed. 1001, 1010 ..... 12, 14

Euclid v. Ambler Realty Co.
272 U.S. 365, 387, 71 L.Ed. 303 13

Hebe Co. v. Shaw
248 U.S. 297, 303, 63 L.Ed. 255 13

Hirsch v. City and County of San Francisco
143 Cal.App.2d 313, 300 P.2d 177, 181–182, 183–184 15

Lawton v. Steele
152 U.S. 133, 136–137, 39 L.Ed. 385, 388 13

Lindsley v. Natural Carbonic Gas Co.
220 U.S. 61, 80, 81 15

Nebbia v. New York
291 U.S. 502, 523, 525, 78 L.Ed. 940, 948, 950, 54 S.Ct. 505, 89 A.L.R. 956, 1469 ..... 9, 12, 13

Patsone v. Pennsylvania
232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539 ..... 11, 13, 15

Purity Extract & T. Co. v. Lynch
226 U.S. 192, 201–202, 57 L.Ed. 184, 189 ..... 13, 14

Rast v. Van Deman & Lewis Co.
240 U.S. 342, 357, 36 S.Ct. 370, 60 L.Ed. 679, 687 ..... 12, 13

Cases Cited—Continued

Semler v. Oregon State Bd. of Dental Examiners
148 Ore. 50, 34 P.2d 311, aff'd 294 U.S. 608, 611–613, 55 S.Ct. 570, 79 L.Ed. 1086 ..... 13, 14

Serve Yourself Gasoline Stations Ass'n. v. Brock
39 Cal.2d 813, 249 P.2d 545, 550, 345 U.S. 980, 97 L.Ed. 1394 11

U. S. v. Carolene Products Co.
304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234, 1241 ..... 12, 13

Valentine v. Chrestensen
316 U.S. 52, 54, 62 S.Ct. 920, 86 L.Ed. 1262, 1265 ..... 12, 15

Viale, et al. v. Foley, et al., No. 4235, Nev. Supreme Court March 31, 1960 15

STATUTES CITED

Chapter 415, 1959 Statutes of Nevada 9
NRS 651.040 17

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1960

No.

GUY T. KELLEY, IRENE R. KELLEY, LOUIS TERRANA, ROBERT H. BOYD, FRANK B. MONROE, NAN SMITH, THELMA STRAIGHT, AGNES THOMAS, HOMER CHARLES AND MELVIN TUFFO,

Appellants,

v.

WILLIAM RAGGIO, C. W. (BUD) YOUNG, TED BERRUM, AND ROBERT GALLI,

Appellees.

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES

THE PROBLEM DESCRIBED

The economy of Nevada is very substantially dependent upon tourism, accounting for the existence of a considerable number of hotels, motels, inns and motor courts for the accommodation of the traveling public. Competition for patronage among those engaged in such business is intense and sharp.

Experience has shown both unfair and fraudulent practices on the part of many operators in said business, consisting of resort to and employment of "bait-advertising," designed to divert and attract tourist patronage to themselves. In order to combat such unfair business practices in their own economic interest, other operators (who would otherwise have refrained therefrom) have been drawn into like unethical practices, resulting in a generally-prevalent condition. The result was that the hotel and motel industry, of fundamental economic importance to the State of Nevada, has been seriously disrupted financially, and has been

criticized and generally held in disrepute by dissatisfied tourists who have been victimized by the unfair and "gouging" practices of many operators in said industry.

The unfair practices principally involved have been misleading, deceptive and fraudulent outdoor sign advertisements respecting the availability of, and prices charged for, accommodations, and (during peak periods in tourist seasons, or holiday weekends) the requirement that patrons rent and pay for accommodations desired for a specified number of days, even though they do not require and do not intend to use said accommodations for the prescribed period of time.

Efforts on the part of the industry itself to eliminate such unfair practices had substantially failed, as had also the partial measures of various county and municipal authorities to "police" the situation. The substantial interest and welfare of both the traveling public, and the communities economically dependent upon such establishments, must be deemed to be essentially involved and concerned in any such unfair practices, justifying their proper regulation and control.

"Bait-advertising" inevitably and generally depresses rates in the industry under consideration during weekdays and in "off" seasons of tourism to an uneconomic minimum, thus compelling compensating "gouging" high rates for the same accommodations on weekends, holidays, and peak periods of the tourist season.

In actual practice and experience, "bait-advertising" even forces otherwise ethical operators in the industry to "fall in line," and to engage in the same unfair practices in economic self-defense. For it is essential to the successful operation and conduct of the business (when "bait-advertising" is prevalent), that prospective patrons be attracted to an establishment, so that an operator shall have an opportunity "to sell" the accommodations he has to offer to the public. Instead of attracting potential patrons on the basis of merit, "bait-advertising" is the "gimmick" employed. Once a person is induced to enter the establishment

he virtually becomes a "captive audience," ripe for the "sales pitch" of the operator. Where the operator is unethical (or compelled in self-defense so to act), the accommodations at the price advertised are found by the would-be patron to be no longer available, having "just been rented" (if they were, in fact, ever available at the advertised price), but (invariably) "other accommodations," at a price or rate excessive of the reasonable value thereof, are always available.

Such are, generally, the actual facts, descriptive of the problem and presumed experience confronting the Legislature of the State of Nevada, in considering and enacting Chapter 415, 1959 Statutes of Nevada. Only as viewed against such actual facts and experience, can proper consideration be given to the regulatory provisions of said Act and their reasonableness as an exercise of the State's police power in relation to the protection of the public interest and welfare.

THE STATUTORY REMEDY

Experience had shown that prior, partial regulatory measures directed to the control and elimination of the evil of "bait-advertising" had proved insufficient and a failure. In such circumstances, can more restrictive, and even prohibitory, measures be considered arbitrary or unreasonable, and invalid as a matter of constitutional law?

The statute here challenged finds its justification in the police power, asserted in the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. "(A) regulation valid for one sort of business, or in given circumstances, may be invalid for another or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." (Nebbia v. New York, 291 U.S. 502, 525, 78 L.Ed. 940, 950, 54 S.Ct. 505, 89 A.L.R. 956)

By outlawing outdoor price signs on the part of hotels and motels, the evils of "bait-advertising" have been effectively and uniformly curbed. The traveling public is no longer induced to stop and seek motel or hotel accommodations on the basis of a sign advertising their availability at a very modest price, only to find that all such advertised rooms are taken "and that the only available lodging is two or three times the price advertised." Manifestly, "the underlying purpose of the act is to break up this species of deception." (Adams v. Miami Beach Hotel Association, Fla., 77 So.2d 465; see also, City of Sarasota v. Sunad, Inc., Fla., 114 So.2d 377)

APPELLANTS' ARGUMENT

Essentially, Appellants' argument may be summarized as follows:

I. The definitions and prohibitions contained in the Nevada statute violate the XIVth Amendment to the Constitution of the United States in that they are unreasonable and arbitrary, and bear no reasonable relation to the end sought. (Pages 3, 5–9 of Appellants' Brief)

II. (a) The provisions of the Nevada statute, in the particular circumstances involved, are prohibitory, rather than restrictive and regulatory, and for that reason constitute an absolute denial of property rights in violation of Federal Constitutional guarantees. (Page 9 of Appellants' Brief)

(b) The Nevada Supreme Court committed error in not finding the legislative enactment unconstitutional on the basis of the evidence before it. (Page 9 of Appellants' Brief)

III. The Nevada Supreme Court committed error in concluding that certain cases, holding unconstitutional statutes limiting outside price advertising of gasoline to signs of

a certain size and prohibiting larger signs, were inapplicable and not controlling of the question here involved. (Pages 10–12 of Appellants' Brief)

APPELLEES' CONTENTIONS

The answer to Appellants' argument as stated in Point I above, is as follows:

A. THE NEVADA STATUTE CONSTITUTES A VALID EXERCISE OF THE STATE'S POLICE POWER AND IS NOT VIOLATIVE OF ANY FEDERAL GUARANTEE

(1) The circumstances prevailing at the time of enactment of the statute must be considered in determining whether the regulatory provisions therein contained are arbitrary, unreasonable, and unrelated to the object of the statute. (Patsone v. Pennsylvania, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539)

(2) "The legislature, in the first instance, is the judge of what is necessary for the public welfare, and, in the absence of a showing of arbitrary interference with property rights or the lack of a substantial relation between means and a legitimate subject for regulation, we cannot declare this legislation invalid. * * * (I)t must be presumed that the Legislature has made a careful investigation in the field, and that it has properly determined that the interests of the public require this regulation." (Serve Yourself Gasoline Stations Ass'n v. Brock, 39 Cal.2d 813, 249 P.2d 545, 550, 345 U.S. 980, 97 L.Ed. 1394)

(3) "* * * legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. * * * It is the duty and function of the legislature to discern and correct evils, and by evils we do not

mean some definite injury but obstacles to a greater public welfare." (Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357, 36 S.Ct. 370, 60 L.Ed. 679, 687) The existence of evidence in the record of facts which would justify enactment is not necessary; the existence of facts supporting the legislative judgment is presumed. (Clark v. Paul Gray, 306 U.S. 583, 594, 59 S.Ct. 744, 83 L.Ed. 1001, 1010; U.S. v. Carolene Product Co., 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234, 1241)

(4) The police power of the State is not limited to regulation or prohibition of acts which are *malum in se*, but if necessary to prevent the perpetration of fraud or to protect and promote the public interest and welfare, the legislature may regulate and even prohibit acts otherwise harmless in themselves. "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." (Valentine v. Chrestensen, 316 U.S. 52, 54, 62 S.Ct. 920, 86 L.Ed. 1262, 1265)

"The Constitution's protection of property rights does not make a state or a city impotent to guard its citizens against the annoyances of life because the regulation may restrict the manner of doing a legitimate business." (Breard v. Alexandria, 341 U.S. 622, 632, 95 L.Ed. 1233, 1242, 71 S.Ct. 920, 35 A.L.R.2d 335, at pages 344-345; see also Nebbia v. New York, 291 U.S. 502, 523, 78 L.Ed. 940, 948, 54 S.Ct. 505, 89 A.L.R. 1469)

(5) The power to regulate extends to and includes the power to prohibit; regulation, *pro tanto*, constitutes prohibition. (United States v. Carolene Products Co., supra) While the regulatory measures provided in the questioned statute are restrictive rather than prohibitory, it is submitted that even total prohibition would not be fatal to the constitutionality of the Nevada statute. "* * * the state may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests

of the public require, but what measures are necessary for the protection of such interests." (Lawton v. Steele, 152 U.S. 133, 136-137, 38 L.Ed. 385, 388; see also, Purity Extract & T. Co. v. Lynch, 226 U.S. 192, 201-202, 57 L.Ed. 184, 189; Euclid v. Ambler Realty Co., 272 U.S. 365, 387, 71 L.Ed. 303; Nebbia v. New York, supra; Hebe Co. v. Shaw, 248 U.S. 297, 303, 63 L.Ed. 255; Patsone v. Pennsylvania, supra; Semler v. Oregon State Bd. of Dental Examiners, 148 Ore. 50, 34 P.2d 311, aff'd 294 U.S. 608, 611-613, 55 S.Ct. 570, 79 L.Ed. 1086; Rast v. Van Deman & Lewis Co., supra; Booth v. Illinois, 184 U.S. 425, 429, 46 L.Ed. 623)

(6) The Constitution does not secure the liberty to conduct a business so as to injure the public at large or any substantial group. (Nebbia v. New York, supra; Euclid v. Ambler Realty Co., supra) Whether in addition to prohibiting false advertising or unfair trade practices it is necessary for the protection of the public to restrict (or even prohibit) the posting of outdoor price signs, considered to be the cause of experienced and serious, undesirable consequences, is a matter for the judgment of the legislature and not the courts. (Booth v. Illinois, supra; United States v. Carolene Products Co., supra)

(7) It is sufficient if deception has or could result from "bait-advertising." That Appellants may have acted in good faith and that the representations in their advertisements may have expressed the truth, must be considered beside the question. The question is: Does the kind of advertising prohibited afford the unscrupulous a means of perpetrating fraud and deception? In itself, there is nothing harmful in merely advertising prices, but who will doubt that motel and hotel operators often resort to "bait-advertisements" to lure tourists to their establishments on the pretense of having accommodations available at a certain price only to find that such accommodations are "no longer available." Once exposed to the operators' "sales pitch," the general result, as shown by actual experience, has been "gouging" or

the charging of excessive prices. (Adams v. Miami Beach Hotel Association, supra: Semler v. Oregon State Board of Dental Examiners, supra)

The Nevada statute does *not* prohibit all advertising, but bars only outdoor price signs as inimical to the public welfare.

(8) That some innocent and truthful operators might fall within the prescribed class does not justify any assumption that, as a matter of law, the end in view was not sufficient to justify the general restrictive provisions contained in the Nevada statute. The Legislature was concerned with a general problem and a practical evil.

"* * * when a State, exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is inocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended." (Purity Extract & T. Co. v. Lynch, 226 U.S. 192, 201–202, 57 L.Ed. 184, 189)

(9) Unconstitutionality must be clear, positive and unmistakably appear; a party challenging the validity of legislation has the burden of showing that it is palpably unconstitutional. That the legislation may not be considered the wisest or the most suitable means of attaining the objects of the statute is irrelevant in determining the constitutionality of the legislative enactment. (Clark v. Paul Gray, supra)

(10) The evil aimed at by the Nevada statute was notorious and general; the principal cause was legislatively determined to be

"bait-advertising"; the statutory remedy legislatively considered necessary to reach and eradicate the evil is direct, susceptible of indiscriminate and uniform application, and administratively feasible and effectual from the standpoint of law enforcement. The only effectual alternative remedy would be to station a policeman in each and every motel or hotel to check and control the veracity of the outdoor price signs used and the availability of accommodations at such advertised prices—manifestly, administratively impracticable and unfeasible.

(11) There is no denial of equal protection of the law. The Nevada statute includes within the classification all who are similarly involved. To be a general law, a statute does not have to be operative every place in the State. "It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. (Patsone v. Pennsylvania, supra, citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 80, 81).

(12) The Nevada statute does not infringe upon the constitutional guarantee of free speech. (Valentine v. Chrestensen, supra; Breard v. Alexandria, supra; Hirsch v. City and County of San Francisco, 143 Cal.App.2d 313, 300 P.2d 177, 181–182, 183–184)

(13) The presumptive and actual need for the restrictive, regulatory provisions of the Nevada statute was a matter for legislative determination and decision, and the enactment cannot be said to be arbitrary, unreasonable, and not substantially related to the described public evil sought to be remedied.

(14) "Appellants have failed to overcome the presumption of the validity of the contested statute." Viale et al. v. Foley et al., No. 4235, Nevada Supreme Court, March 31, 1960. (Page 21 of Appellants' Brief)

The answers to Appellants' arguments, as stated in Point II (a) and (b) above, are sufficiently contained in the opinion of the Nevada Supreme Court (Pages 15–21 of Appellants' Brief):

B. (1) THE NEVADA STATUTE IS RESTRICTIVE AND REGULATORY: IT INVOLVES NO ABSOLUTE DENIAL OF PROPERTY RIGHTS: AND IT IS NOT VIOLATIVE OF ANY CONSTITUTIONAL GUARANTEE.

(2) THE EVIDENCE SUBMITTED BELOW BY APPELLANTS WAS NOT SUFFICIENT TO REBUT THE PRESUMPTION OF CONSTITUTIONAL VALIDITY OF THE NEVADA STATUTE.

(1) "It is to be noted that the restrictive legislation found in said subsection 2 pertains to advertising only; that the advertising which is regulated relates only to room rates; and that the advertising of room rates is prohibited only with respect to outdoor or outdoo. signs. Under these circumstances, it cannot be said that there is a prohibition against all forms of advertising nor is there a total prohibition of advertising of room rates. The statute does not prohibit all outdoor signs or all advertising. Outdoor advertising of the type of accommodations, services, and accessories afforded is not restricted. Advertising of rates by newspapers, television, radio broadcasting, handbills, etc., is not prohibited. In other words, the statute must be construed as restrictive and regulatory of the manner and means of advertising rates rather than an absolute prohibition against any kind of advertising and thus involves no absolute denial of a property right without due process of law." (Page 18 of Appellants' Brief)

(2) "While it is proper for the trial court to permit the introduction of evidence as an aid in its determination of the

validity of a statute resulting from the need to promote the general welfare, (cases) the existence of evidence in the record of facts which would justify the enactment is not necessary; the existence of facts supporting the legislative judgment is presumed." (Cases). (Page 20 of Appellants' Brief)

* * *

"In addition to the presumption of the need of this statute for the promotion of the public welfare, such need for this type of regulation is further evidenced by the fact that the 1960 session of the Nevada Legislature has enlarged the application of NRS 651.040 to apply to counties having a population of 10,000 or more persons when theretofore it applied only to counties of 25,000 or more persons." (Page 21 of Appellants' Brief)

* * *

"Appellants have failed to overcome the presumption of the validity of the contested statute." (Page 21 of Appellants' Brief)

The answer to Appellants' argument as stated in Point III, above, is as follows:

C. THE WEIGHT OF AUTHORITY RELATIVE TO RESTRICTIVE REGULATIONS OF GASOLINE PRICE ADVERTISEMENTS ARE NOT APPLICABLE NOR CONTROLLING OF THE QUESTION HEREIN.

The Nevada Supreme Court, specifically and expressly, so found. (Pages 19-20 of Appellants' Brief) There are many relevant, important, and definite factual differences and distinctions in the two situations to justify and support such conclusion.

Opportunity for fraud and deception, based upon small or large price signs advertising the sale of gasoline, is difficult if not

impossible. There is legitimate basis for differences of opinion and judgment concerning the need for and the substantiality of the relation between the restrictive regulation of the number and size of gasoline price signs to the perpetration of fraud and deceit.

The commodity, gasoline, is fixed; the quantity purchased and delivered, *mechanically regulated, controlled, and dispensed;* the price paid, inclusive of any sales tax (whether set forth in a small or large sign), advertised and brought to the attention of a prospective purchaser; and a gasoline service station would, presumptively, find it difficult to charge a price for gasoline so sold, different from that which was advertised. Generally, therefore, a proper and sufficient basis for valid exercise of a State's police power for protection of the public interest and welfare is lacking in such circumstances. However, we are not prepared to concede that intervention and regulation by a State, *under any and all possible* circumstances, is and would be, *absolutely precluded under existing constitutional guarantees.*

It is submitted that the actual factual situation is quite otherwise in "bait-advertising," or outdoor price signs, on the part of motels and hotels. The commodity is not fixed but various and differently-priced accommodations; the number of rooms rented and available for rent at a specified and advertised price at any given time is also not fixed but uncertain; use of "bait-advertisements" to lure, mislead, and "gouge" prospective tourist patrons has been actually experienced to the substantial detriment of the public interest and welfare; and, finally, the described abuses and evils cannot otherwise be effectually prevented and eradicated.

In short, the fixed conditions and controls, mechanical and otherwise, preventing manipulation, deception or fraud, and "gouging" in connection with the purchase and sale of gasoline, are not present in "bait-advertisements" and rental of motel or hotel accommodations.

CONCLUSION

We submit that there has been no taking of property without due process of law, or denial of any other fundamental right guaranteed by either the Constitution of the United States, or the Constitution of the State of Nevada.

Respectfully submitted,

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